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In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
AND
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners contend that the Federal Energy Regulatory Commission (Commission) violated the Independent Offices Appropriation Act (IOAA), 31 U.S.C. 9701, in establishing fees for approving rate changes proposed by natural gas pipelines.

1. The statutory background and relevant facts are set forth in the opinion of the court of appeals (Pet. App. 3a-6a, 8a-9a). The IOAA embodies "the sense of Congress" that the recipient of a "service or thing of value provided by an agency" should pay fees so that the provision of such services is "self-sustaining to the extent possible" (31 U.S.C. 9701(a); Pet. App. 1e). To that end, agencies are authorized to levy charges that are (31 U.S.C. 9701(b); Pet. App. 1e):

(1) fair; and
(2) based on—
  (A) the costs to the Government;
  (B) the value of the service or thing to the recipient;
  (C) public policy or interest served; and
  (D) other relevant facts.

Under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, when a pipeline makes a rate change in order "to recover [the pipeline's] costs and earn a fair rate of return on jurisdictional sales," it must submit the change to the Commission for review and approval (Pet. App. 6b (footnote omitted)). The Commission promulgated regulations setting a fee of $2,000 for processing a rate change (*id.* at 23b). It explained (*id.* at 16b-21b) that it reached this figure by first calculating its total employee costs (based on time records) of processing applications for rate changes; then adding a proportionate share of overhead and support services (specifically excluding activities, such as responding to public and governmental inquiries, for which the agency found little or no benefit to applicants); and then dividing the costs for all applications by the number of completed applications to determine a single fee for each application. The Commission justified the charge on the ground that a natural gas pipeline receives a specific benefit from the Commission's services in approving rate changes because rates "provide a means for the [pipeline] to obtain its revenues" (*id.* at 12b-14b & n.18).[1]

The Commission also provided (Pet. App. 26b-28b) a different fee procedure for complex rate change applications. For such applications, the agency bills the pipeline directly for the actual costs of processing its application. In that way the costs in extraordinary cases do not affect the fees charged in routine cases.

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[1] As this Court recognized in *FPC* v. *New England Power Co.*, 415 U.S. 345, 351 (1974), Bureau of the Budget Circular No. A-25 (Sept. 23, 1959) contains "the proper construction of the Act." That circular provides in relevant part (Pet. App. 9a, 1f) that "[w]here a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service."

2. The United States Court of Appeals for the Tenth Circuit upheld the Commission's fee regulations (Pet. App. 1a-18a). Although there was agreement that "the transfer of a 'special benefit' to an identifiable recipient is a prerequisite for establishing a lawful fee by an agency" (*id.* at 10a), petitioners argued that the Commission had not properly applied that governing principle here. Petitioners contended that benefits provided by the Commission "accrue to the general public [and] not to the regulated industries" and therefore the cost of granting services "cannot be assessed against and borne by petitioners" (*ibid.*). The court squarely rejected that claim, relying on the established principle that where "an agency performs a service from which a regulated entity derives a 'special benefit,' it may charge a fee, even though the public also benefits" (*id.* at 12a).

The court held (Pet. App. 14a) that the Commission "identifies the benefits which it believes are conferred upon the regulated entity applying for the Commission's services. It appears from the record before us that the Commission gave careful consideration to the requirements of the IOAA * * * [and] did not act arbitrarily or capriciously." The court further held that "the *full costs* of providing a service to regulated entities can be assessed regardless of the benefit flowing to the public" so long as there is a measurable benefit to the pipeline (*id.* at 15a (emphasis in original)). The court also rejected the contention that the "direct billing procedure" used in extraordinary cases is a "pretext for fees which the Commission 'arbitrarily' decided not to establish," holding that it is "reasonably related to administrative enforcement and does not contravene statutory provisions" (*id.* at 17a).

3. The decision below is correct and is consistent with the statute and with this Court's decisions in *National Cable Television Ass'n* v. *United States,* 415 U.S. 336 (1974); and *FPC* v. *New England Power Co.,* 415 U.S. 345

(1974). The decision does not conflict with any decision of any other court of appeals. Further review is therefore not warranted.

a. As the court of appeals held (Pet. App. 8a-10a), and petitioners concede (Pet. 7-8), the IOAA and this Court's decisions permit agencies to charge fees to "identifiable recipient[s]" (*New England Power,* 415 U.S. at 349-351) of "special benefits" (*National Cable,* 415 U.S. at 343). The Commission and the court of appeals concluded that because Section 4 of the Natural Gas Act, 15 U.S.C. 717c, prohibits pipelines from changing rates unless the Commission approves the new rate, agency processing of a rate change confers a special benefit on an identifiable recipient.

Petitioners claim, however (Pet. 10), that the IOAA "was not intended to cover the consumer protection function performed by the Commission in determining that pipeline rates are just and reasonable," and (*id.* at 11) that the IOAA does not include "authority to impose fees for the performance or regulatory functions of a nonlicensing character." These contentions are not supported by the statute and are inconsistent with controlling case law. The IOAA, both as initially enacted (31 U.S.C. (1970 ed.) 483a; Act of Aug. 31, 1951, ch. 376, § 501, 65 Stat. 290; Pet. App. 2e) and later recodified (31 U.S.C. 9701; Act of Sept. 13, 1982, Pub. L. No. 97-258, § 9701, 96 Stat. 1051; Pet. App. 1e), clearly authorized fees to be charged to the identifiable immediate beneficiaries of agency actions, even though the public benefits from the overall regulatory scheme. The original statute authorized fees for "any * * * thing of value" (Pet. App. 2e). The recodified version retains the phrase "thing of value" and in addition authorizes fees for any "service" an agency provides (Pet. App. 1e). For example, in *New England Power,* 415 U.S. at 351, this Court stated that a rule on accounting practices—a "regulatory function of nonlicensing character"—provided the basis for a fee if the industry derives a benefit.

In this case it is beyond dispute, and the Commission so found, that the individual pipelines benefit from the processing of their rate change applications. Finally, as the court of appeals recited, petitioners' argument has been rejected by the Fifth, Tenth and District of Columbia Circuits (Pet. App. 11a-12a (citing *Electronic Industries Ass'n* v. *FCC,* 554 F.2d 1109 (D.C. Cir. 1976)); *Mississippi Power & Light Co.* v. *NRC,* 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); and *Nevada Power Co.* v. *Watt,* 711 F.2d 913 (10th Cir. 1983)).

b. Petitioners' reliance on this Court's decisions in *National Cable* and *New England Power* is misplaced. In both cases, the Court rejected annual fees, which it found to be in the nature of taxes, assessed generally against members of the regulated industry without regard to specific agency action benefiting particular entities. The Court did *not* hold that an agency may not charge fees for specific regulatory activities that benefit identifiable entities merely because the ultimate function of the regulation is consumer protection. As the court of appeals noted here, to hold that agencies may not charge fees for services which in any way benefit the public could constitute a judicial repeal of the IOAA, for " 'all public agencies are constituted in the public interest' " (Pet. App. 12a (quoting *Mississippi Power & Light Co.,* 601 F.2d at 229)).[2]

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[2] Petitioners mistakenly rely (Pet. 12-13) on a portion of the court of appeals decision in *New England Power Co.* v. *FPC,* 467 F.2d 425 (D.C. Cir. 1972), aff'd, 415 U.S. 345 (1974) in which the court stated that if the public benefits at all, the agency may not charge a fee. That language has no continuing force for two reasons. First, although the court of appeals so stated, this Court's decision in *New England Power* did not rely on that rationale. See 415 U.S. at 349. Second, the District of Columbia Circuit itself abandoned that analysis in *National Cable Television Ass'n* v. *FCC,* 554 F.2d 1094, 1101, 1102 (1976).

Nor is there any merit to petitioners' contention that in a prior rulemaking proceeding in 1965, the Commission took a different position on fees. An agency is not precluded from changing its mind

c. Nor is there substance to the claim (Pet. 8-10) that the Commission impermissibly designed its fee schedule to recover all its costs by assuming the existence of individual benefits when in fact the Commission rulings merely "shift onto regulated companies the cost of performing basic and inherently public benefit functions not covered by the IOAA" (*id.* at 10).

The court of appeals found (Pet. App. 14a-17a) that the Commission had satisfactorily explained how it arrived at the fee structure, specifically identifying which costs were included and which were excluded (see *id.* at 16b-19b, 11d-13d). The Commission calculated its employee costs and overhead, such as rent, utilities and printing, to determine the average monthly cost of processing an application, and multiplied the figure by the average number of months it took to review rate applications. The Commission next calculated support costs, such as budget and management, and apportioned them to the fees at issue according to the percentage of its total time the agency consumed in reviewing rate applications. Finally, the agency excluded certain activities, such as responding to public inquiries, litigation, enforcement and rulemaking from the fee structure.

Thus, contrary to the petitioners' assertion, the agency neither assumed that all of its activities provide a special benefit nor sought to recover all its operational costs. Rather, it focused on actual service to petitioners and amply explained the basis for its fees.

d. Finally, there is no merit to petitioners' challenge to the Commission's direct billing procedure applicable to extraordinary cases. Under that procedure (which the agency has never had occasion to apply), the Commission would

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(*NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351 (1978); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)), especially where, as here, intervening court decisions have clarified the IOAA.

charge a company the actual cost of reviewing a filing, rather than the standard fee based on averages.[3] As the Commission explained, this procedure would be confined to the rare complex case in which the standard fee "bear[s] no reasonable relationship to the actual cost of processing" (Pet. App. 27b), and will be implemented on a case-by-case basis. In these circumstances, the court of appeals correctly found (*id.* at 17a) that the Commission had acted reasonably in providing for such unusual filings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Extraordinary cases are not included in the calculation of average costs (Pet. App. 27b).

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